30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1104

HUGH B. MONJAR, ALSO KNOWN AS H. B. MONJAR,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1105

JOSEPHINE T. MONJAR,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1106

ABRAHAM J. COOK, ALSO KNOWN AS A. J. COOK,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1107

JOHN FENTON JONES, ALSO KNOWN AS J. F. JONES,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1108

CLEMENT O. DREW, ALSO KNOWN AS C. O. DREW,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

DANIEL O. HASTINGS,
WILLIAM A. GRAY,
HOMER CUMMINGS,
Counsel for Petitioners.

INDEX

Subject Index

Cases Cited

STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1104-1108

HUGH B. MONJAR, Also Known as H. B. Monjar; JOSEPHINE T. MONJAR; ABRAHAM J. COOK, Also Known as A. J. Cook; JOHN FENTON JONES, Also Known as J. F. Jones; CLEMENT O. DREW, Also Known as C. O. Drew,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, Hugh B. Monjar, Josephine T. Monjar, Abraham J. Cook, John Fenton Jones, and Clement O. Drew, pray that writs of certiorari be issued to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on December 1, 1944, affirming the judgments of the United States District Court for the District of Delaware.

Opinions Below

The opinion of the District Court on demurrer to the indictment (A. 111a),[1] is reported in 47 F. Supp. 421. Other opinions of the District Court on the admissibility of certain exhibits offered by the Government (A. 216a), and denying motion for directed verdict (A. 227a) are not officially reported. The opinion of the Circuit Court of Appeals (SA. 185-198) is not yet officially reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 1, 1944 (SA. 198-201). The petitioners timely filed a petition for rehearing (SA. 207-226). The Circuit Court of Appeals on January 26, 1945 (SA. 227), and on February 24, 1945 (SA. 227-228), entered orders amending its opinion. Order denying petition for rehearing was entered February 28, 1945 (SA. 229). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court, May 7, 1934.

Questions Presented

1. Whether a conviction for use of the mails "in the sale" of a security in violation of Section 17 of the Securities Act of 1933 can be sustained where the evidence shows that the only use of the mails or any means of interstate communication by defendants—a report by the vendor's agent to the vendor of the fact of sale—occurred subsequent to the com-

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[1] References herein are to:
"A.—" Petitioners' Appendix
"SA.—" Petitioners' Supplemental Appendix
"GA.—" Government's Appendix
"R.—" The stenographic transcript.

pletion of the sale of the alleged security, involved no solicitation of, or communication to, the purchaser, and was not for the purpose of lulling the purchaser, or concealing the sale, and fails utterly to show that the use of the mails or interstate means of communication was in any way in furtherance of the sale.

2. Whether, when the evidence relied upon by the Government to establish the sale of "a security" in a prosecution under Section 17(a) of the Securities Act of 1933 consists not only of a document but as well of testimony as to alleged oral representations at the time of its transfer, the question as to the sufficiency of the evidence to establish the sale of "a security" within the statutory meaning of that term may be determined by the Court as a matter of law and withdrawn from the jury, or is properly to be submitted to the jury under instructions as to the applicable law.

3. Whether admissions by defendants as to essential elements of the crime charged made by defendants to an investigating agent of the United States Bureau of Internal Revenue, and procured and induced as a direct result of his promise not to cooperate with a pending SEC investigation, are as a matter of law within the privilege against self-incrimination under the Fifth Amendment.

4. Whether, where in an indictment including numerous substantive counts for violation of the mail fraud statute and of Section 17(a) of the Securities Act of 1933, and one count for conspiracy to violate such statutes, each count of the indictment alleges a single scheme to defraud by organizing a club so that the defendants could fraudulently obtain money from persons joining the club, and where the case is tried on the theory that the club was set up to carry out the scheme to defraud and that but a single scheme is in-

volved, and where the jury was instructed that the defendants could be found guilty only if it found the alleged scheme was devised prior to organization of the club—Whether the evidence is sufficient as a matter of law to sustain conviction on any count of the indictment where a finding of fradulent purpose on the part of any of the defendants at the time of the organization of the club (in 1928) can be made only by the violent assumption that, from actions of some of the defendants (in 1934, a year after the club was reorganized for expansion) allegedly evidencing their fraudulent intent immediately prior thereto, it may be retrospectively inferred that such fraudulent purpose and intent existed at the time the club was formed more than five years earlier.

Statutes Involved

The Act of May 4, 1909, c. 321, sec. 215, 35 Stat. 730 (18 U. S. C. Sec. 338) provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * to be sent or delivered by the post office establishment of the United States, or shall take or receive * * * therefrom, any such letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The Securities Act of 1933, May 27, 1933, c. 38, Tit. I, 48 Stat. 84 (15 U. S. C. sec. 77) provides:

> Sec. 17(a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or

indirectly—(1) to employ any device, scheme, or artifice to defraud * * *. (15 U. S. C. sec. 77q(a))

* * * * * * *

Sec. 24. Any person who wilfully violates any of the provisions of this subchapter * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. (15 U. S. C. sec. 77x).

Statement

Petitioners were named as defendants in an indictment in 25 counts: 17 substantive counts (counts 1 to 15, 23 and 24) charging violation of the Mail Fraud statute; 7 substantive counts (counts 16 to 22) charging violation of the fraud provisions of the Securities Act; and one count (count 25) charging conspiracy to violate both the Mail Fraud statute and the fraud provisions of the Securities Act (A. 19a-95a). There was a directed verdict for defendants on counts 1, 4, 9, 19 and 22. Verdict of guilty on all of the 20 remaining counts was returned against all the defendants except Josephine Monjar, who was found guilty on the conspiracy count alone (A. 8a). The defendant Hugh B. Monjar was sentenced on the 14 mail fraud counts to imprisonment for five years on count 2, and one year on each of the others, sentences to run concurrently, and to pay cumulative fines of $1,000 on each of the 14 counts; on each of the five Securities Act counts, to one year imprisonment and $5,000 fine, sentence to run concurrently with that on count 2; and on the conspiracy count, to one year imprisonment concurrent with that on count 2, and $10,000 fine, a total of $49,000 in fines (A. 9a-10a). With the exception of Mrs. Monjar, each of the other defendants was sentenced to serve three years on count 2 and one year on each of counts 3, 5, 6 and 7, and one month on all remaining counts, all to run concurrently with the sentence on count 2, and to

pay cumulative fines of $1,000 on counts 2, 3, 5, 6 and 7, a total of $5,000 each. Mrs. Monjar was sentenced to serve a term of 18 months and pay a fine of $10,000 on count 25 (A. 10a-11a). The Circuit Court of Appeals affirmed (SA. 198-201) and denied petition for rehearing (SA. 229).

Investigation.—In December, 1941, an indictment was found against some of the officers and local members of the Mantle Club in Pittsburgh, Pennsylvania. A general investigation by the Securities and Exchange Commission ensued and the Internal Revenue levied a jeopardy assessment against all the funds in the banks of Wilmington standing to the credit of the Mantle Club (R. 5124-5126, 17-22-1726). At the behest of the Securities Exchange Commissioner a grand jury investigation was commenced in January, 1942. On May 26, 1942 the indictment here involved was returned (A. 19a).

Indictment.—It alleged that the defendants had devised a scheme to defraud persons, members of the Mantle Club, and that "it was part of the scheme to defraud that the defendants would, during the year 1928, cause to be organized, and they did so organize" the Mantle Club (A. 20a-21a); that thereafter defendants and their associates would and did meet and listen to Monjar talk regarding their self-betterment and social and economic advancement; that from 1933 on defendants would and did organize Key Publishing Company and publish a magazine known as "American Key", and for that purpose solicit and obtain from their associates $400.00; that from 1933 on defendants would and did expand the Mantle Club and set up districts in many large cities, each controlled by a District Board of Governors (A. 21a); that defendants would and did amend the constitution of the Mantle Club to provide for the National Board of Governors of three persons; that Monjar, Cook, and J. F. Jones would and did become members of the three-man Board, to be self-perpetuating (A. 22a); that Monjar

should and did become editor of American Key Magazine, J. F. Jones President, and Cook Treasurer of Key Publishing Company (A. 22a); that Monjar as editor should receive from Five Hundred to Fifteen Hundred Dollars per month, and Cook and J. F. Jones each Five Hundred Dollars per month; that the Key magazine would be sold almost entirely to members of the Mantle Club at 25¢ per copy; that defendants would and did publish Monjar's writings as "The Code of Ethics" and "Supplement to the Code of Ethics", and sell same to members at Two Dollars per copy, with royalty of one dollar per book to Monjar, later reduced to twenty cents (A. 23a); that defendants, after the Mantle Club had been set up on a nation-wide basis, would and did solicit the members to make personal loans to Monjar (A. 24a-35a); that Monjar never intended to return the said loans (A. 32a); that among other things, it was falsely represented that the loans had nothing to do with, and were an activity separate and apart from the membership in the Mantle Club, whereas the defendants well knew that the Mantle Club had been organized so that Monjar could obtain money by means of personal loans from Mantle Club members (A. 31a).

The indictment further alleged that defendants would set up the Golden Braid Costume Company and from proceeds of said loans, cause a large sum of money to be paid to the sister of Monjar, and to his secretary, with which to purchase stock in said company, and that the latter (the defendant, Josephine Monjar) as president of said company, should receive Fifteen Hundred Dollars monthly salary, and that Monjar's sister and nieces should receive salaries from the same company; that Mantle Club should buy from it fifty thousand costumes though there were never fifty thousand members entitled to wear them (A. 36a-37a). It was also charged as part of the scheme that defendants would set up American Business Management Corporation

and, out of the proceeds of the loans, enable their associates to become stockholders and would cause them to be elected officers and directors thereof, and the company to pretend to render services to Golden Braid Costume Company and Key Publishing Company and make charges therefor, but furnish no services of value (A. 38a); that defendants would set up American Business Research Corporation and cause their associates to be officers and directors thereof, and loan said associates part of the proceeds of the aforesaid loans to buy stock of said corporation; similar allegations were made with respect to the setting up of Portland Research Corporation and American Distributing Corporation (A. 38a-39a).

The indictment then alleged that defendants would pay to themselves and their close associates out of moneys received from initiation fees and dues, large sums by way of salaries, bonuses, traveling and other expenses (A. 40a); that defendants would set up Independence Club of America, and pay themselves large sums by way of salary and expenses; that defendants, their agents and representatives, would make false representations to persons who had made loans to Monjar (A. 40a-42a); that defendants would cause dissatisfied persons to be told that if they had confidence in Monjar they would not apply for any refund (A. 42a).

The evidence.—The evidence (uncontested except as otherwise indicated) discloses the following facts:

Activities of Monjar antecedent to formation of the Mantle Club.—Hugh B. Monjar in San Francisco in October, 1924, organized a group known as the Decimo Club. He was its Chairman and Chief Executive, and with three others, constituted the Board of Governors. Its purpose was the securing of justice, protection and opportunity for its members. The initiation fee was $20.00, and the monthly dues $2.00. Originally the Club contracted to pay Monjar the initiation fees in full in consideration of his obtaining

members and otherwise managing the Club and paying organization expenses. After about one and a half years Monjar caused his contract with the Decimo Club to be altered to allow him only $5.00 of the $20.00 initiation fee. By 1927 the Club had spread to thirty-four cities from coast to coast, and had a gross membership of sixty-two thousand (GA. 1449a, 1450a). In 1925 Monjar, with his own money, set up the Apasco Purchase and Sales Corporation, owned and controlled by him, which enabled all members of the Decimo Club who subscribed to its services, to purchase various articles of merchandise at substantial discounts (R. 6078-6081). For instance, at Cleveland, fifteen hundred members, at a total cost of $4500.00, saved $40,000.00 (A. 516a). The Apasco was a great success (A. 515a-517a). By 1927 it had branch offices in twenty-seven cities (GA. 1450a) and Monjar had given several thousand shares to Decimo members (GA. 1451a).

In 1927 dissension sprang up in the Decimo Club, and charges were made against Monjar by its counsel, the then Attorney General of Massachusetts. As a result of this and other conduct, the said Attorney General resigned from public office to avoid impeachment, and was disbarred (A. 1454a). At the last minute Monjar, who was a candidate to succeed himself, as Chairman and Chief Executive of the Club, withdrew, as did his whole slate of officers, making way for the election of a new Board of Governors. This new Board made charges against Monjar which he denied. However, he turned over to an escrow agent, pending an audit, all of the stock of the Apasco Corporation, and all of the stock owned by it in the Drew Tailoring Company. In March, 1928, four months after Monjar's resignation, suits for receivers were brought against the Decimo Club on the ground that it was violating its charter after Monjar withdrew from it, by transacting business for profit. On trial the new Board of Governors failed to justify their

actions, and therefore the charter was revoked, a receiver was appointed, and the corporation was still in liquidation in 1931 (GA. 1444a, 1453a-1454a). It is uncontroverted that the Decimo Club was successful under Monjar's guidance (SA. 16, 17, R. 3346 and Gov. Ex. 155).

Mantle Club formation in 1928 and activity until 1933.—On January 11, 1928, one Robinson, of New York City, wrote Monjar suggesting formation of the organization that later became the Mantle Club (A. 454a). Monjar replied favorably (A. 455a-456a), and shortly thereafter others in northern New Jersey, Mr. Genor, Mr. Eldridge, and Mr. Cook, wrote Monjar suggesting the formation of a fraternal organization with Monjar as its leader (A. 456a-457a). The Mantle Club was not formally organized until January 17, 1929 (R. 6093), and during the intervening year there were intermittent discussions having to do with the constitution and by-laws. In these general discussions about fifteen or twenty persons participated at a few group meetings. Twenty-three persons signed the formation resolution of the Mantle Club (A. 458a). Mantle Club members and others totaling over one hundred, met each week for five years from 1928 to 1933 and listened to talks delivered by Monjar pertaining to their self-betterment and social and economic advancement (GA. 1120a; SA 43-44). By May of 1933 the Mantle Club had about seventy members (A. 459a; GA. 1119a). The Constitution drawn up two or three months after formation of the Club in 1929 provided for an elected Grand Tribunal of ten men (A. 458a, 465a). There were no initiation fees or monthly dues, merely assessments based on expenditures, actual or contemplated, in the immediate future (A. 459a).

Key Publishing Company organization.—The persons who listened each week for five years to Monjar's talks regarding self-betterment and economic questions, desired

a permanent record of his talks, and therefore, ten or fifteen men held meetings and decided that a magazine would be the best form for doing this. At the meeting at which publication of the magazine was agreed upon, there were present about one hundred (A. 460a-461a) and about one hundred subscribed for a total of about four hundred shares at one dollar per share. This was not limited to Mantle Club members (A. 462a). This group was known as the Group of 125 and was composed of members of the Mantle Club plus other individuals associated in the H. B. Monjar & Company, Inc.[2] vocational service (GA. 1119a, A. 452a). The stockholders of the Publishing Company themselves solicited annual subscriptions but later the business was put on a monthly sales basis (A. 462a-463a). Defendants Jones became President, A. J. Cook, Vice-President and Treasurer, and Monjar, Editor of the Magazine (GA. 23a-24a). At no time did Monjar own any stock (GA. 1662a, 1667a). It published a magazine known as "The Key Magazine", later changed to "The American Key".

The Mantle Club, 1933-1942.—As a result of publication of The Key magazine, inquiries were received in May, 1933 from readers in other cities as to whether Mr. Monjar proposed to set up another fraternal organization (A. 464a, GA. 1119a), and Mr. Summers, as a representative of a number of those in California who had been associated

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[2] H. B. Monjar Company, Inc., a New York corporation, was formed in 1928 to render vocational guidance to subscribers for an initiation fee of ten dollars plus monthly dues of two or three dollars. The national number of subscribers was approximately eight hundred, but due to adverse newspaper publicity, its membership was greatly reduced to approximately one hundred and twenty-five (GA. 1718a). It became dormant and was replaced by a new corporation rendering substantially the same services and known as Business Executives Association (GA. 1200a). Another organization known as the Holare Corporation was also brought into existence about the same time to furnish to its subscribers the service of obtaining discounts from wholesale distributors (GA. 1200a-1201a).

with Mr. Monjar in the Decimo Club, and others, none of whom were defendants herein, urged that a new fraternal organization be set up or that the existing Mantle Club be expanded with autocratic control to prevent the difficulty experienced with the Decimo Club (A. 464a, 466a). As a result of these requests, defendant Drew was sent to California to make a survey and reported that a California group sincerely wanted such a fraternal organization (A. 471a-472a). As a further result the club became national in scope and its constitution was amended to provide that the Grand Tribunal of ten members should be reduced to a three-man self-perpetuating Board of Governors (SA. 46; A. 481a-551a). This amendment was signed by all the seventy or eighty then members of the Mantle Club (A. 481a). Therefore, six of the nine members (one vacancy had not been filled) resigned, leaving Monjar, Cook and Jones as members of the new three-man Board of Governors (A. 403a, 472a, 481a, GA. 1121a). In 1940 the constitution was amended to provide that the local Board of Governors of each district unit, theretofore selected by the National Board of Governors (GA. 238a, et seq.) should be elected by the members. The members would also elect one representative to the National Council for each one thousand members. The National Council elected a ten-man National Board of Governors (A. 481a, R. 6228). This was done at a meeting of all the local Boards of Governors held in January 1940 in Chicago (A. 367a). The National Council held meetings in 1940, 1941, 1942 (A. 389a), and received and approved reports and certified audits regarding the Club's affairs including all expenditures by the National Board from 1933, and authorized from time to time further expenditures by the National Board (A. 388a-394a, R. 3308-2215).

From the time that, under the program of expansion, the first unit was established at Oakland, California, thirty

units were set up in most of the large cities of the United States (GA. 1506a), and by 1940, the Club had over $300,000 cash in the bank (Ex. A of Gov. Ex. 281F; SA. 121), and 34,991 members (GA. 1505a).

The Mantle Club and its mode of operation.—Under what was known as the Club's contact structure, a member upon joining was placed in a group of ten, one of whom was designated as Captain (GA. 243a), who during each week had personal contact with each man of his group regarding the application of the teachings of the Club (GA. 244a-245a, A. 341a). Each group of ten Captains was under the jurisdiction of a Division Head and in turn each group of ten Division Heads was presided over by a Section Head (GA. 244a, 1701a). Some of the larger units had as many as five Section Heads, indicating a membership in an individual city of more than 4,000 (GA. 357a). In joining, a prospective member was first invited to an investigation meeting (GA. 240a-248a). After paying an initiation fee of $20.00, he was told the history of Monjar and his early promotion of the Decimo Club, including phases of the opposition which had arisen to Monjar by various organizations (GA. 240a-248a, 1449a-1456a). After this explanation he was offered an opportunity to withdraw and the return of his initiation fee. If he did not withdraw, a speaker would explain further the history and purpose of the Mantle Club, and that Monjar had a definite set of business plans which were his own property, and that if Monjar should invite any individual to participate therein that would be a separate venture since the Mantle Club was a non-profit organization (GA. 246a-247a, 1415a-1416a, 1148a).

Subsequent to the investigation meeting, assimilation meetings were held at which the Club's purposes and principles and their application in every-day life were empha-

sized and references were made to the ability of Monjar (GA. 242a-246a). Frequently it was stated that Monjar's plans would be revealed to members as their record justified their getting the information (GA. 359a). Members were given co-points as evidence of their participation in certain activities of the Club (GA. 305a-309a, 335a-336a, 418a, 419a; Gov. Ex. 154; GA. 1457a, 847a-855a). These were awarded on the basis of 20 points for membership, 40 points for attendance at the official monthly meetings (OMM) and 40 co-points for payment of the dues of $2.00 at the monthly meeting.

The entire initiation fee was remitted to the National Board of Governors in Wilmington (Gov. Ex. 107, GA. 1414a). Fifty percent of the monthly dues of $2.00 were remitted to the National Board of Governors, and 50% retained by the local district (GA. 242a-243a). Detailed financial reports were required to be made by the local boards to the National Board, and expenditures by the former were subject to approval by the latter (GA. 342a-344a), but no disapproval was shown.

At the monthly and full-member meetings, addresses dealing with one or more of the principles discussed in the "Code of Ethics" and Key magazine were given by Club members selected in advance by the local Board of Governors. Inspirational talks were given, usually illustrated by the speaker's own personal experience in the application in his daily life of the ethical principles as taught by the Club, with highly beneficial results (A. 318a, 321a-322a, 324a, 331a, 333a, 336a, 341a-343a). After a recess for collection of dues there were similar talks followed by adjournment with the singing of a patriotic song (GA. 237a-252a). Over six thousand letters (samples of which appear in SA. 174-183) show the benefits received by members from the application of Mantle Club principles. Likewise, the results compiled from a questionnaire in 1941, showing all

sorts of benefits to large percentages of the members[3] (A. 623a). Many letters show very successful community work (SA. 171-174 and Def. Exs. 67-B and 74).

Upon joining, a person became an associate member, and upon it appearing that he was earnest and sincere in his Club activities, he advanced to full membership (GA. 1716a). There was a monthly meeting of full members and a number of special meetings of different kinds and for different purposes (GA. 237a-252a, 892a). At these meetings there was emphasized the importance and advantages of applying the Club's principles in every-day life, and the method of application was explained (A. 330a-331a, 336a-338a, 341a-343a; R. 7165-7167).

General letters, bulletins and instructions from the National Board to each local unit (Def. Exs. 11, 14, 32), the sports events, social affairs and picnics held by the local units and the civic and other activities (Def. Ex. 72) of the members together with regular study and constant teaching of club principles (Def. Ex. 66) and the application thereof to the life of each member, keeping full reports and attending many meetings (Def. Ex. 19) each month in accordance with the club's requirements kept the members quite busy at all times (Def. Ex. 32, 72, 45, R. 8456-8481).

The personal loans to Monjar.—In February 1934 Monjar wrote a letter to Clement O. Drew requesting him to present to some members of the Mantle Club an opportunity to make loans to him (Gov. Ex. 254; GA. 1638a). He speci-

[3] This questionnaire answered at a particular monthly meeting attended by a total of 28,370 out of a total membership of 33,900, showed that:

1. 97.85% had acquired increased friendships
2. 70.67% had their family life improved
3. 82.76% had more fully understood and fulfilled civic responsibilities
4. 45.96% had increased their income
5. 81.82% had more confidence in the future and felt more secure
6. 79.64% had received other values not mentioned.

fied that prospective lenders should understand that he would do all in his power to see that they would receive great benefit from their assistance, and that the minimum amount of the loans would have to be $3.00 per month for ten months, and the maximum $20.00 per month for ten months, to be payable only in monthly installments, so as to insure that he would have a definite income each month. Pursuant to this letter, and for eight years, Monjar and Drew, later assisted by one Elkin, together with agents (either acquitted or not indicted), conducted once each year the solicitation of personal loans from part of the members of some of the district clubs (GA. 1765a, 1777a; Gov. Ex. 293, 1507a) which were referred to as PL loans (GA. 480a-481a, 554a, Gov. Ex. 257). Certain individuals whom the PL agents believed were active club members [4] were asked to attend a meeting (GA. 480a-481a, 554a, 878a, 566a). At the meeting those attending were informed that it was not a Mantle Club meeting and the history of Monjar's prior activities and difficulties was told them (GA. 857a, et seq.). They were told that the loan was solicited on conditions fixed by the borrower, including the specified minimum and maximum size and the installment requirements. It was also stated that Monjar was to be permitted to do as he pleased with the money, and the money would be paid back by Mr. Monjar at his convenience, probably many years later (GA. 1681a). Occasionally Mr. Monjar himself addressed the meeting at which the personal loans were solicited (GA. 253, et seq., 365a et seq., 485a, 489a, 566a).

After the loans were solicited, someone belonging to the local unit was designated as the PL agent (Gov. Ex. 257, GA. 925a-931a). Usually installments of the loans were paid to the PL agent, after the adjournment of the

[4] No Club record of the members' financial standing was inspected (R. 3977-3978).

official monthly meeting of the Club (GA. 1472a). Upon payment the lender received a receipt as follows:

"Received of John Doe the sum of

$\$$_____

a/c HBM-PL No. _____"

This receipt was signed by the PL agent (GA. 419a-420a, 271a-272a). The moneys were transmitted by cashier's check or New York draft payable to the order of A. J. Cook, and addressed to him at Wilmington by mail (GA. 255a).

The loans continued annually for a period of eight years. At the end of six years the loans were called "CD" loans. These were numbered 1 and 2, and continued up to February 1942 (GA. 253a, 365a, 408a, 489a, 566a).

There was some sharply disputed and contested evidence from only six cities in the far west tending to show that financial rewards were promised as an inducement for making the loans, and that they had not been realized. The funds received from the loans were expended in appreciable amounts for the personal benefit of Monjar and his family (Gov. Ex. 263-276, and Gov. Ex. 294). Beginning about 1938, Monjar paid his former wife the sum of $1500.00 a month, or a total of about $118,000.00 (Gov. Ex. 294).

From sums obtained through these personal loans, Monjar paid an income tax assessment of $220,000.00 on profits from the Apasco Corporation. Although Monjar claimed the assessment to be improper, he forfeited his chance for a successful defense when his tax counsel failed to appear at the hearing. (45 F. Supp. 303, affirmed 132 F. 2d 990; GA. 740a-741a, 1768a).

During the period from 1934 until the latter part of February 1942, $1,280,042.81 was borrowed by Monjar, and

$238,727.00 returned. Thereafter, and by September 15, 1942, a large percentage of the members to whom these loans were owing made contributions for Monjar's benefit and in this way about $800,000 of these loans were repaid (A. 308a-315a).

Business of Key Publishing Company.—For his services as editor of Key Magazine, Monjar at times received salaries varying in amount, and sometimes as high as $1500 per month. In 1938 his saalry as editor was terminated (GA. 34a-36a). Jones and Cook, as officers of the company, at times received salaries as high as $400 per month in later years (GA. 33a, et seq.; Also, Gov. Ex. 297).

In 1937 the "Code of Ethics," a book consisting of a collection of Monjar's articles, was published and sold to members at $2.00 a copy, of which Monjar received $1.00 royalty. (GA. 32a-34a). A second volume of similar nature called "Supplement to Code of Ethics" was subsequently published and sold in the same manner and Monjar received the same royalty (GA. 37a-38a). Later his royalty on these books was reduced to twenty cents (GA. 21a, et seq.).

The Mantle Club itself bought large numbers of the Key Magazine for the purpose of being able to furnish the back numbers to new members who were likely to want them, as experience had clearly demonstrated. The magazine was not of merely current topical interest but rather discussed ethical principles and their practical application. On December 31, 1941, the Mantle Club included among its assets $133,306.35 worth of American Key Magazines purchased at the wholesale price of fifteen cents per copy and representing 888,709 magazines in the Publishing Company's warehouse (GA. 100a-101a). However, during the period April, 1933, to October, 1942, the total sales of current issues was 1,379,487, and 528,208 back issues were sold (Gov. Ex. 25, sheet 2, GA. 1364a, et seq.). As soon

as it appeared that the Key Publishing Company itself had funds to carry sufficient inventories of back issues to meet future demands of club members for them, the Club itself practically ceased purchases, and the Publishing Company took over the task. As of August 31, 1942, 897,777 copies were held by the Publishing Company and 889,856 copies by the Mantle Club (Gov. Ex. 30-31). It also appeared that from 1939 to 1942 sales by the National Board of back issues exceeded its purchase from and after 1939 (GA. 1366a).

The testimony of all Government witnesses was to the effect that the Key magazine was of considerable value to them (A. 316a-344a, Def. Ex. 74a, 74b). The intrinsic worth of the magazine to its readers was clearly recognized (R. 2155-2164, especially 2163; also (SA 174-177, being two of 1700 similar letters in Def. Ex. 74).

Golden Braid Costume Company.—This company was created to manufacture for Mantle Club members a ritual costume for $15.00 (Gov. Ex. 258). The total output of this company, about 50,000 costumes, was sold only to the Mantle Club (GA. 1505a) and by it in part resold to local units. The latter sold to members always at the price of $15.00 (GA. 1705a; Gov. Ex. 295). Only "full" members of the Club were authorized to wear the costume and the total membership by 1940 had grown to about 35,000 (GA. 1505a). It appeared that shipments by the National Board of Governors to the local Boards, which sometimes exceeded immediate needs, were based upon estimates of the probable future needs (GA. 756a-758a, 933a-936a, 1285a-1289a). As of December 31, 1941, the National Board had on hand and unsold about 27,000 garments valued at $399,000.00 (Gov. Ex. 295, GA. 1787a). The National Board of Governors anticipated a membership of about 100,000 for whom costumes would be wanted and otherwise difficult to obtain (GA. 1517a-1637a, R. 3380). They were worth the $15.00

paid for them, and the last 6600 were ordered at the direction of the National Council of the Club (A. 393a-394a and Article V of Def. Ex. 10; also A. 391a, A. 388a, and SA. 34-35).

The only dividends by the Company totaled $77,000.00 paid (before she married Mr. Monjar) to Mrs. Drew, the principal stockholder, and $17,900.00 paid to Mrs. Mason, a sister of Mr. Monjar (GA. 1791a). Just before Mrs. Drew married Mr. Monjar she sold and delivered her stock in the Costume Company to Edwin T. Elkin for $16,000.00, advanced on his behalf by defendant Cook out of the funds the latter was handling for Mr. Monjar (GA. 1708a). It further appeared that in 1941, subsequent to Mrs. Drew's withdrawal, the National Board, pursuant to directions from the National Council, ordered six thousand costumes at the same price (SA. 159-160, being Def. Ex. 61).

The Relationship of the Defendants to the Club.—Hugh B. Monjar was the Chairman of the Board of Governors from its inception (GA 1643a).

A. J. Cook was a member of the National Board of Governors from 1929 and was its Treasurer from 1933 on (GA. 1743a). In December, 1927, he had contacted Mr. Monjar to find out what could be done to keep alive and how to succeed in continuing the general idea of the Decimo Club (GA. 1774a).

J. F. Jones was also a member of the National Board of Governors from the inception of the Club in 1929 (GA. 1745a), had aided in the organization and management of Key Publishing Company, and made personal loans to Monjar (GA. 1127a).

Clement O. Drew had been active in organization work and was a member of the ten-man Board of Governors elected in 1940, was Chairman of the National Membership Committee, and Second Vice-Chairman of the National Board (GA. 1679a).

Mrs. Josephine T. Drew was employed by the Mantle Club as secretary to Mr. Monjar from November 1, 1933 to September 30, 1935 (GA. 1509a). She, with another, received from Monjar $10,000 for the purpose of setting up the Golden Braid Costume Company. She was President of the Golden Braid Costume Company from 1936 to 1940. She received dividends of $77,600 and salary of $66,000 over that period in which she managed the entire business of the corporation including the supervision of thirty to forty-five employees. In 1940 she disposed of all her stock, resigned from her position as President of that company, and married Mr. Monjar (GA. 1514a). Mrs. Monjar in her affidavit in support of her request for a bill of particulars (GA. 1511-1516, Gov. Ex. 243) declares that she had no knowledge whatever of the source of the funds loaned to her with which she bonught Golden Braid stock; that she, as President of the Costume Company, dealt at arm's length with the National Board (GA. 1514a). The foregoing constitutes the only evidence offered against Mrs. Monjar to sustain the charge of conspiracy of which was found guilty.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Third Circuit erred in holding:

1. That use of the mails by defendants after completion of the sale of a security is a use of the mails "in the sale" of a security within the meaning of Section 17(a) of the Securities Act of 1933.

2. In failing to hold that a verdict of guilty of conspiracy to violate Section 17(a) of the Securities Act of 1933 and the mail fraud statute must be set aside where there is no evidence that the provisions of the Securities Act would be violated by the purpose of the conspiracy or the means of accomplishing it.

3. In failing to hold that the trial court erred in directing the jury that as a matter of law, the personal loan transactions constituted a sale of securities as the terms "sale" and "security" are defined in the Securities Act of 1933.

4. In holding that confessions by defendants induced and influenced by promises of non-cooperation with the SEC by the Internal Revenue Agent to whom they were made are not thereby rendered incompetent under the Fifth Amendment

5. In holding that after indictment, trial, and verdict for mail fraud statute and Security Act violations and conspiracy to violate those laws, on instructions all limited to allegation and proof of a scheme to defraud by the formation of a club, conviction may, in the absence of evidence of such scheme, nevertheless, be sustained so long as some scheme is shown to have existed at the date of the use of the mails.

6. In holding that evidence of acts in 1934 from which fraudulent intent of defendants in that year was inferred permits of the further and retrospective inference that defendants had such fraudulent purpose at a time five and even seven to ten years earlier.

Reasons for Granting the Writ

The trial of this case consumed a period of 57 days of actual trial. That numerous errors crept into the proceeding is largely attributable to the failure on the part of the Government to determine and disclose in the indictment or by Bill of Particulars, or during the course of the trial, a definite theory for the case.

1. The erroneous construction of the Securities Act by the court below involves a recurring and highly important question of Federal law which should be decided by this Court.—Conflict in principle with a decision of this Court also results from the decision of the Circuit Court of Appeals in this case.

Counts 16-18, 20 and 21 of the indictment on which petitioners were convicted purport to allege violations of Section 17(a) of the Securities Act (15 U. S. C. sec. 77q(a)):

> "It shall be unlawful for any person in the sale of any securities by use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
> * * *
>
> "(1) to employ any device, scheme or artifice to defraud * * *."

The pertinent portions of count 17 (typical of all) allege (A. 76a):

> "the defendants * * * having devised and intended to devise said scheme and artifice to defraud * * * did * * * feloniously employ said scheme and artifice in the sale of a security * * * by the use of the United States Mails, which said use of the United States Mails was as follows:"

Each count then goes on to allege that defendants sent by the mails or by telegraph a letter or telegram addressed to A. J. Cook from one of the other defendants or from a PL or CD agent reporting the results of meetings for the purpose of obtaining PL or CD loans (A. 74a-87a).

To support these allegations the evidence of the Government showed that the letter or telegram described in each of the security counts on which petitioners were convicted was sent merely as a report, by the local PL representative of Mr. Monjar, of the moneys received from individuals to whom he had issued the receipts relied on by the Government as constituting securities.[5] There was no evidence to

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[5] Count 16. Gov't Ex. 211 at GA. 859a.
Count 17. Gov't Ex. 221 at GA. 920a, 927a, indicating bank draft was attached.
Count 18. Gov't Ex. 212 at GA. 860a.
Count 20. Gov't Ex. 77 at GA. 287a; GA. 254a-255a.
Count 21. Gov't Ex. 127 at GA. 601a, 596a.

show that the particular letter or telegram was otherwise related to the sale. There was no evidence to show, and it was not argued, that it was *in furtherance* of the sale.

The petitioners demurred to these counts of the indictment on the ground, among others, that the uses of telegraph or mail "were not uses made in the sale of securities" within the meaning of the Act, nor made in or about the procurement of the sale or disposition of or contract of sale of a security, nor were such uses or communications to or from, or intended for, or expected to be seen or relied upon by, any alleged purchaser of any security or any alleged security (A. 108a).

Again, the petitioners made a motion for a directed verdict at the close of the Government's case (A. 226a) and at the close of the whole case on the ground, among others, that there was no evidence to support the allegations of counts 16 to 22, inclusive, that defendants sold or attempted to sell "any security by the use of" the mails or an instrumentality of interstate commerce within the meaning of 15 U. S. C. sec. 77q(a). (A. 675a-676a, 691a).

The trial court, on demurrer, overruled the contention (A. 117a-118a) and denied the motion for a directed verdict with respect to these counts (R. 10016), except that counts 19 and 22 were withdrawn from the jury (A. 734a). The defendants also submitted, and were refused, their prayer for instruction No. 19 (A. 691a-721a). They were allowed an exception (A. 749a).

The erroneous theory of the trial court in disregarding the plain language of the statute and overruling defendants' motion for a directed verdict appears from its instruction

to the jury that under the Securities Act, sec. 17(a) (A. 773a):

> "It is not necessary for the mails or the instrumentalities of interstate commerce to have effectuated the definite steps which consummate the fraud; *it is sufficient if the mails* or the instrumentalities of interstate commerce *were used as a step in, or in furtherance of,* a device, scheme, or artifice to defraud. * * * The question you must decide is whether the PL and CD loans * * * were made *in connection* with the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails * * *." (Emphasis supplied.)

Petitioners, contending that "in the sale" is at most no broader than "in furtherance of the sale" and certainly does not mean "in furtherance of the fraud," assigned error (Assignments Nos. 1, 4, and 23, A. 764a-765a, 776a).

The Circuit Court of Appeals held (SA. 189.):

> "Knowledge of what happened at those meetings and their tangible results in the form of cash statements and covering bank drafts were necessary to the defendants. That information was supplied by the letters and telegrams which are the source of the security counts. Those letters and telegrams were all sent to Cook, the treasurer of the club, by one or the other of his co-defendants or by a loan agent. *Obviously, they were in furtherance of the sale of the loans.*" (Emphasis supplied.)[6]

In the first place, it is plain that the statute condemns only employment of a fraudulent scheme "in the sale of any securities * * * by the use of the mails" or other

[6] The error in this conclusion as to the sufficiency of the evidence to show that it was in furtherance of the sale of the loans is aggravated by the fact that the case was submitted to the jury on a much less strict rule.

any securities * * * by the use of the mails" or other means of interstate transportation or communication. Certainly the statute does not condemn employment of a fraudulent scheme in the use of the mails. Neither does it merely duplicate the mail fraud statute to punish use of the mails in furtherance of a scheme to defraud. The language is rather clear. It requires no extraordinary perspicuity to perceive that if, as part of a fraudulent scheme, one uses the mails "in the sale of any securities," he is subject to punishment. But there is no hint in the language of this section that one who merely obtains money by a fraudulent scheme or that one who merely defrauds by sale of securities is punished. These acts, standing alone, are both beyond federal jurisdiction. The statute, recognizing constitutional inhibitions, requires as an additional element that the mails or other means of interstate communication be used.

But the Act goes further and particularizes that the mails or other communication means must be used, not merely in furtherance of a fraudulent scheme but used specifically "in the sale of securities." The mail fraud statute was narrowly confined to use of the *mails* and broadly applied if such use was in "furtherance" of the scheme (18 U. S. C. sec. 338). On the other hand, the Securities Act, sec. 17a (15 U. S. C. sec. 77q(a)) is broad in its embrace of the use of the mails and other means of interstate communication and transportation as well but narrow in its requirement that such we be "in the sale of securities," although fraud be employed. As stated by Judge Yankwich in *United States* v. *Williams*, 1 S. E. C. Jud. Dec. 51, 52:

> "it is quite plain from the wording of the section [15 U. S. C. sec. 77q(a)] that use of the mails must be a means for selling the securities. * * * So we have the artifice to defraud, the obtaining of property under false pretenses, as one element; and the other, *the use of the mails for the purpose of sale of the security.*"

Again, in *United States* v. *Carter & Co.*, 56 F. Supp. 311 (W. D. Ky., 1944), the court held (p. 314):

> "In proceeding under Section 77q of Title 15 U. S. C. A. it is necessary that the Government allege the existence of a scheme or artifice to defraud and the use of the mails to carry out that scheme, and *then to allege in addition thereto that the acts occurred in the sale of a security.*" (Emphasis supplied.)

The lower courts, particularly the trial court, plainly treated the Securities Act provision as if it were the equivalent of the mail fraud statute. This judicial enlargement by the District Court by interpretation of a criminal statute is at war with the fundamental concept of the common law that a crime must be defined with appropriate definiteness. *Pierce* v. *United States*, 314 U. S. 306, 311. As stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391, and reaffirmed in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Under the trial court's instruction, it would be sufficient under the Securities Act, section 17, to allege and prove a scheme to defraud related to sale of securities and the use of the mails merely in furtherance of the scheme. The Circuit Court of Appeals, apparently recognizing the trial

court's error, concludes that the letters and telegrams "were in furtherance of the sale of the loans."

Even if we concede that the correct rule is that, as the Circuit Court of Appeals apparently recognizes, use of mails or telegraph "in furtherance" of sales is sufficient to constitute use "in the sale of any securities" within the meaning of the statute, it is plain that the defendants have been deprived of a trial by jury under the security counts of the indictment. For the trial court erroneously instructed, and permitted the jury to find, that the defendants were guilty if the defendants merely used the mails in the furtherance of a scheme to defraud. Plainly, the Circuit Court of Appeals may not speculate as to what the jury would have found, had it been properly instructed.

Conflict in principle with the decision of this Court in *Kann* v. *United States*, 323 U. S. 88, is plain. There the question was whether the use of the mails was "for the purpose of executing such scheme" within the meaning of the mail fraud statute (18 U. S. C. sec. 338). Here the question is whether the use of the mails was "in the sale of any securities." There the question was whether the use of the mails was in furtherance of the fraudulent scheme. Here the question is whether the use of the mails was in furtherance of the sale. In that case this Court held that the scheme in each of the transactions involved "had reached fruition" before the use of the mails occurred. Distinguishing cases where the mails were used prior to and as one step toward the obtaining of the fruits of the fraud or as a means of concealment, this Court said (p. 95):

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

It is submitted that this language is properly to be paraphrased with respect to the Securities Act:

> "Section 17(a) of the Securities Act does not purport to reach all frauds, but only those in which the use of the mails is an integral part of the consummation of the sale employing the fraud, leaving all other cases to be dealt with by appropriate state law."

It is submitted that the *Kann* case makes clear the desirability of similarly calling attention to the limitations in scope of the Securities Act.

None of the cases cited by the court below support its decision. In *Kopald-Quinn & Co.* v. *United States*, 101 F. 2d 628, cert. denied 307 U. S. 628, the contention was that the evidence under 15 U. S. C. sec. 77q(a) must show (1) a scheme to effect sales and (2) actual sales of securities by mail. Obviously this was too narrow in view of the definition of "sale" contained in 15 U. S. C. sec. 77b(3) and was properly overruled. In *Pace* v. *United States*, 94 F. 2d 591, allegations as to a letter expressing thanks for orders for stock given salesmen were held, under 15 U. S. C. sec. 77q(a), sufficient to withstand demurrer. But such a communication might well be regarded as part of the closing of the sale, as in the course of it, or so closely related thereto that, being directed to the vendee, the mailings were properly to be regarded, within the meaning of the statute, as a use of the mails "in the sale" of securities. In *Landay* v. *United States*, 108 F. 2d 698 (C. C. A. 6), the opinion states (p. 701) what, under the most narrow construction of the statute, must properly be regarded as fully adequate facts said to have been alleged in four counts under 15 U. S. C. sec. 77q(a) (1) and in four counts under 15 U. S. C. sec. 77q(a) (2). The Government apparently exhibited to the Circuit Court of Appeals below a copy of one count in that case which was based on a letter ac-

knowledging receipt of a check and an order to purchase. While this does not appear from the reported opinion, it should be noted that aside from the fact that, at the time of such mailing, the sale was presumptively still to be consummated by actual delivery, it is even more important to note that the sentence was general and therefore sustainable on the other nine counts on which conviction was had. *Pierce* v. *United States*, 252 U. S. 239, 252-253; *Evans* v. *United States* (No. 2), 153 U. S. 608.

It seems plain that the several circuit courts of appeals have by their broad language in their interpretation of Section 17(a) of the Securities Act indicated a developing tendency, not only to assimilate, but to identify, the offenses under the mail fraud statute and the offense under Section 17 of the Securities Act. The pernicious effect of such broad generalization is best reflected by the plainly erroneous instruction of the trial court in this case. Clarification by this Court of the elements of the offense under Section 17(a) of the Securities Act will obviously promote expeditious and correct disposition of the same question which is bound frequently to recur until authoritatively settled.

As a corollary to the insufficiency of the evidence to sustain conviction on the substantive counts under the Securities Act, the verdict and judgment under count 25 of the indictment must also be set aside.—In this case count 25 of the indictment charged the defendants with conspiracy under 18 U. S. C. sec. 88 to commit wilful violations of the mail fraud statute and Section 17 of the Securities Act (A. 92a-95a). As shown above, under Point 1, the evidence is inadequate as a matter of law to show any violation of Section 17 of the Securities Act, either as alleged in counts 16-22, inclusive, of the indictment or otherwise. Admittedly, the only evidence introduced to show the existence of a combination contemplating acts in violation of Section

17 of the Securities Act consisted of the acts proved by the Government and by it relied upon to sustain convictions on the substantive counts for violation of the same Section. Since, as shown above, those acts do not constitute violation of Section 17 of the Securities Act, it, therefore, necessarily results that there was no evidence upon which a jury could rightly find under count 25 the existence of a conspiracy to violate Section 17 of the Securities Act, as alleged in count 25.[7]

To save the point, the defendants moved to withdraw from the jury all consideration of the evidence offered to sustain the allegation that the defendants conspired to violate Section 77q(a) of Title 15 of the United States Code (A. 686a). This motion was overruled and exception noted (A. 750a). Error therein was properly assigned (A. 784a).

It is well established that where a conspiracy count alleges combination to commit several substantive offenses, and where the evidence is insufficient as a matter of law to show combination as to one or more of such offenses, then a verdict of guilty thereon cannot be sustained since the jury may have reached its verdict in reliance solely on the evidence inadequate as a matter of law to show any fraud. In *United States* v. *Groves*, 122 F. 2d 87 (C. C. A. 2) a number of defendants were indicted for using the mails to defraud and for conspiracy to do so. As stated on page 89:

> "Each count of the indictment set forth three separate frauds alleged to have been practiced on G.I.C. pursuant to the scheme."

The evidence indicated fraud in the purchase of minority stock and its resale to a corporation, and two frauds in the

[7] It is to be noted that this is the only count on which Josephine T. Monjar was found guilty (A. 8a) and sentenced (A. 11a).

procurement of two commissions on account of the sale of securities of the corporation. Referring to one of the defendants, one George Groves, the Court recognized that there was some evidence of his participation in the minority stockholder fraud, but added (page 91):

> "But there was no further evidence at all of his connection with the procurement of the two fraudulent commissions, and under the circumstances we feel that a jury would not be justified in finding that he participated in either of them. But if it could not find that he participated in both, his conviction must be reversed for it was allowed, over objection, to consider together his guilt in respect of each of the three frauds alleged, and hence each must be proven. United States v. Smith, 2 Cir. 112 F. 2d 83. See United States v. Koch, 2 Cir., 113 F. 2d 982, 984."

The Second Circuit has long recognized that where the defendant under a conspiracy indictment properly moves to withdraw from the consideration of the jury for insufficiency of the evidence any of a plurality of offenses alleged to have been the objective of the conspiracy, and the court improperly overrules such motion and submits generally to the jury the issue of a conspiracy to commit that offense together with issues of conspiracy to commit other offenses, then an adverse verdict cannot be sustained on the theory that it was based upon evidence adequate to support a finding of the other frauds. *United States* v. *Mascuch*, 111 F. 2d 602, 603 (C. C. A. 2, 1940); *United States* v. *Smith*, 112 F. 2d 83, 86 (C. C. A. 2); *United States* v. *Koch*, 113 F. 2d 982, 983-984 (C. C. A. 2).

It is therefore clear that if, as contended above (pp. 22-30), the use of the mails by defendants may not properly be deemed to have been "in the sale of any securities," then the convictions under count 25 must be set aside.

2. **The trial court plainly invaded the province of the jury and deprived petitioners of their right to a jury trial in instructing as a matter of law that the personal loans constituted sale of securities within the meaning of the Securities Act.**—The opinion of the Circuit Court holds there were no errors in the trial (SA. 198). In so holding, it has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision.

Here the trial court gave the binding instruction to the jury that a security had been sold by the defendants. The defendants throughout the trial had contended that the loan receipt, relied on by the Government in counts 16-22, inclusive, as being a security (i. e. an evidence of indebtedness or an investment contract (A. 214a)) was not a security within the meaning of the Securities Act (R. 1581, 1869-1870, 2340, A. 108a-109a; A. 675a, par. 16; A. 691a, prayer 19).

But the court instructed (A. 733a):

> "The question you must decide is whether the PL and CD loans, constituting a sale of securities as the terms 'sale' and 'security' are defined in the Act, were made in connection with the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails."[8]

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[8] This was followed with the further statement by the court (A. 733a-734a):

> "You must find, in order to convict under the counts, that the defendants received money from these loans and that the victims were told that the money was to be used I quote, 'to organize business concerns which would operate for the benefit of the persons making the loans.' And you must also find that the money was paid over by the members with the expectation that the return to be obtained would give to such 'worthy men' financial independence."

This was plainly only to caution that the third element, fraud, must be found by the jury before they could convict of the crime under the security counts.

The constitutional right to jury trial of course requires that decision of issues of fact be fairly left to the jury. *United States* v. *Murdock*, 290 U. S. 389, 394; *Patton* v. *United States*, 281 U. S. 276, 288. The question whether the personal loans here involved constituted securities within the meaning of the statute is plainly a mixed question of law and fact which, under proper instructions as to the law, should have been left to the jury for final determination. In *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, it was held (p. 351):

> "Instruments may be included within any of these definitions [in the Securities Act] if on their face they answer to the name or description."

But this Court further held (p. 355) that where proof that documents being sold were securities under the Act requires going outside the instrument itself to show the character given it by the terms of the offer and by the economic inducements, then such proof, in a criminal case must "meet the stricter requirement of *satisfying the jury* beyond a reasonable doubt" (emphasis supplied).

Here the trial court in overruling a demurrer, held that the giving of what was apparently a mere receipt for money was a sale of an evidence of indebtedness or an investment contract. And the Government plainly relied on the testimony of oral representation made in inducing the loan as showing that the transactions constituted an investment contract within the meaning of the statute. The question whether this was a security—either evidence of indebtedness or an investment contract—and hence within the operation of the Securities Act was thus plainly a question of fact for the jury under the decision in the *Joiner* case. There was a large amount of conflicting evidence on the question of what representations had been made. The taking of the question from the jury deprived petitioners of

their constitutional right to a fair trial on an obviously vital issue. *United States* v. *Murdock*, 290 U. S. 389, 394; *Quercia* v. *United States*, 289 U. S. 466; *Patton* v. *United States*, 281 U. S. 276, 288.

No exception was taken to the instruction at the trial but the error is so obvious and so plainly prejudicial that this Court may and should nevertheless of its own motion note and correct it. *United States* v. *Atkinson*, 297 U. S. 157, 160; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.

3. **The decision of the court below holding admissible confessions of the defendants induced by promises of an internal revenue agent is in conflict with decisions of this Court.**—The Government offered in evidence Exhibit 254 (GA. 1638a), being a memorandum from the defendant Monjar to the defendant Drew, dated February, 1934, in which Monjar first suggested the procurement of the personal loans, and as well Gov. Exhibits 255 (GA. 1642a), 256 (GA. 1670a), 275 (GA. 1678a), 258 (GA. 1704a), 259 (GA. 1715a), 260 (GA. 1726a), 261 (GA. 1736a), and 262 (GA. 1742a), the latter being transcripts of statements of the defendants Monjar, Drew, Josephine T. Monjar, Willard, Maddams, and Cook, made before one Cordes, Special Agent of the United States Internal Revenue Bureau, in April, 1942.

The agent who obtained these statements and was called to identify these exhibits testified that in his conference with the attorney for the Mantle Club and Mr. Monjar personally on March 2, 1942, he told them "that in return for the complete cooperation of the Club officials, that I would not cooperate in the S. E. C. investigation then in progress" (GA. 611a). Upon statement by the United States Attorney as to proposed proof by this witness, counsel for the defendants objected that it was clearly a violation of

the understanding (GA. 613a) and that the statements constituted confessions and were not admissible under *Bram* v. *United States*, 168 U. S. 532 (R. 2973-2974). Because the major portion of the argument of the question had been off the record, when the exhibits were offered in evidence (R. 5023-5026, GA. 963a-965a) counsel for defendants formally stated their objections for the record, and exception was noted (R. 5028). His three contentions were (1) the Treasury Department had not unqualifiedly waived the right to refrain from exhibiting this information; (2) "the obtaining of information upon an assurance of that kind, and the later admission of such evidence into evidence was a violation of the Fifth Amendment to the Constitution of the United States"; (3) the obtaining of evidence in this way was a violation of law (R. 5026-5028).

After argument the trial court entered its opinion March 29, 1943. It held that the exhibits were admissible, relying principally on *Gibson* v. *United States*, 31 F. 2d 19, cert. denied 279 U. S. 866, and *Olmstead* v. *United States*, 277 U. S. 438. Referring to his "unqualified approval of the dissenting opinions" in the latter case, the trial judge nevertheless held that he was without power to exercise his discretion to exclude the evidence (A. 216a-220a). The highly prejudicial nature and effect of the exhibits involved is unquestioned. The Circuit Court of Appeals, while it did not at first notice the point (SA. 185-198), after the filing of the petition for rehearing, amended its opinion to include a holding that no Treasury regulation prohibits the testimony as given, that the promise not to cooperate with the Securities and Exchange Commission investigation had been kept, and finally that the Fifth Amendment was not infringed because the proof was overwhelming that the statements were voluntary (SA. 228-229).

The statements obtained from Monjar and the statements obtained from the other defendants by Government

witness Cordes all constituted confessions of the truth of some of the essential parts of the guilty facts charged in the indictment. They were induced by the promise Revenue Agent Cordes made to the attorney for the Mantle Club and Monjar personally that "in return for the complete cooperation of the Club officials, that I would not cooperate in the S. E. C. investigation then in progress." This promise of protection from the Securities and Exchange Commission was clearly offered as an inducement to obtain the statements of the defendants.

Under the rule stated in *Bram* v. *United States*, 168 U. S. 532, the statements made by the defendants, if they amount to a "confession," were clearly inadmissible because obtained as result of an inducement offered by the Government officer and calculated to operate upon the minds of the defendants. The rule is as there stated (pp. 542-543):

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books.
>
> "In 3 Russell on Crimes, (6th ed.) 478, it is stated as follows:
>
> "'But a confession in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises*, however slight, nor by the exertion of any improper influence * * *. A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the

> prisoner, and therefore excludes the declaration if any degree of influence has been exerted.'" (Emphasis supplied.)

As held in *Wilson* v. *United States*, 162 U. S. 613, 623:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."

In the court below the Government rested its contention on the ground that the statements were merely the acknowledgment of subordinate facts. This argument was obviously without merit. While it is true that a mere admission of a subordinate fact or subordinate facts from which, with other evidence, guilt might be inferred, does not rise to the dignity of a confession, it is clear that an acknowledgment in express words by the accused in a criminal case of the truth of the essential facts of the crime charged or of the facts constituting some essential part of the crime amounts to a confession accompanied by the safeguards against self-crimination. Indeed, in *Wilson* v. *United States*, 162 U. S. 613, the court went so far as to hold (pp. 621-622) that although the defendant's——

> "answers to the questions did not constitute a confession of guilt, yet he thereby made disclosures which furnished the basis of attack, and whose admissibility may be properly passed on in the light of rules applicable to confessions. Of course, although verbal admissions must be received with caution, though free, deliberate and voluntary, confessions of guilt are entitled to great weight. But they are inadmissible if made under any threat, promise, or encouragement of any hope or favor."

And in *Bram* v. *United States*, 168 U. S. 532, the court quoted with approval (p. 541):

> "The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: 'The rule

> excludes not only direct confessions, but *any other declaration tending to implicate the prisoner in the crime charged* even though, in terms, it is an accusation of another, or a refusal to confess.'" (Emphasis supplied.)

In *Ercoli* v. *United States*, 131 F. 2d 354 (App. D. C., 1942), the court cited with approval 3 *Wigmore Evidence*, 3d ed. 1940 sec. 821:

> "What is a confession? Denials, guilty conduct, and self-contradictions distinguished. A confession is an *acknowledgment* in express words, by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it.* It is to this class of statements only that the present principle of exclusion applies. In this sense therefore there are in particular three things which fall without the meaning of the term 'confession' and are thus not affected in any way by the present rules, namely, (1) guilty conduct, (2) exculpatory statements, and (3) acknowledgments of subordinate facts colorless with reference to actual guilt." (Emphasis supplied.)

In the amendment of its opinion, by order entered February 26, 1945, the court below failed to meet this point. It merely said (SA. 229):

> "As to the constitutional point, there is overwhelming proof in the record that the statements were voluntary. We have also examined the trial court's admonition to the jury when the statements were received into evidence. There was no objection to this at the time, nor was there any request later of the Court to charge specifically concerning them. We find no material error by the Court in connection with the statements in question."

The opinion of the court below misses entirely the point that a confession, even if voluntary, may not, under the Fifth Amendment, be offered in evidence if shown to have been induced by promises.

Proper exception was taken to admission of the confessions.—Plainly at war with the record is the court's statement SA. 229 that there was no objection at the time the statements were received into evidence. The offer was made (R. 5023-5026), objections were stated (R. 5026-5028), and the court ruled (R. 5028):

> "Well, for the reasons set forth in the memorandum opinion which I filed several days ago [A. 216a-220a], I overrule the objection and let an exception be noted."

The statements obtained by promises of protection against S. E. C. investigations were confessions in that they constituted admissions of essential elements of the crimes charged.—This statement and the discussion thereof is, of course, no admission that the evidence was sufficient as a matter of law to prove any crime under the indictment. That the statements of Monjar (Gov. Exs. 255 and 256, GA. 1642a and 1670a) constituted admissions of essential elements of the crime charged is apparent from a mere reading of them. The first statement was relied upon because, among other things, it contained the identification by Monjar of Ex. 254 as his (GA. 1655a). This memorandum includes directions to make solicited lenders understand that Monjar would "do all in my power to see that eventually they will receive great benefits from their assistance financially at this time" (GA. 1639a). This memorandum (apparently sent to Drew (GA. 1655a-1656a)) thus displays the directions of Monjar as to the mode and basis for negotiating the loans. Admissions of its authorship by Monjar plainly constitute admission of an essential element of the crime charged in that it shows Monjar actively directed the making of the alleged fraudulent misrepresentations as to returns on the loans. Indeed, as Monjar himself noted (GA. 1657a), and as is apparent

from the course of questions and answers (GA. 1657a-1659a, 1660a-1662a, 1665a-1667a), the questions by the internal revenue agent give the statement but little significance on an income tax investigation and seem patently directed along the lines of an investigation preliminary to this prosecution.

The statements by the other defendants in Gov't Exs. 257-262, inclusive (GA. 1678a-1742a) thus obtained by the inducing promise of the revenue agent equally plainly admitted essential elements of the charge of use of the mails to defraud and of sale by use of the mails employing a scheme to defraud. They also supplied evidence of the purpose to violate the mail fraud statute and the Securities Act, which were referred to as the objectives of the conspiracy charged in count 25.

The holding of the Circuit Court of Appeals that there was no material error in admitting these statements is obviously in conflict with the decisions of this Court cited above, and with that of the Circuit Court of Appeals for the Eighth Circuit (*Sorenson* v. *United States*, 143 Fed. 820, 823) and with circuit court decisions (*United States* v. *Pocklington*, Fed. Cas. No. 16,060; *United States* v. *Pumphrey's*, Fed. Cas. No. 16,097). The conflict should at least be resolved.

4. **The evidence was insufficient as a matter of law to show the existence of the scheme charged in the indictment and constituting the basic theory on which the case was tried and submitted to the jury.**—In approving verdicts reached only by a retrospective presumption that from acts evidencing fraudulent intent it may be inferred that a similar fraudulent intent existed five years earlier the decision violates basic rules of reason and conflicts with decisions of this Court.

The indictment charged that the scheme to defraud included the organization of the Mantle Club. It alleged (A. 20a-21a, 31a):

> "1. It was part of the scheme to defraud that the defendants and their associates did, during the year 1928, cause to be organized, and they did so organize, an unincorporated association to be known, and it was known, as the Mantle Club; * * *
>
> * * * * * * *
>
> "19. It was further part of said scheme to defraud that the defendants would cause and direct the representatives of the National Board of Governors of the Mantle Club, in connection with the solicitation for the personal loans to Hugh B. Monjar, one of the defendants, falsely to represent to such persons:
>
> * * * * * * *
>
> "(c) That the persons making the loans had nothing to do with membership in the Mantle Club and that it was an activity separate and apart from the Mantle Club, whereas in truth and in fact, as the defendants then and there well knew, *the said Mantle Club had been organized and set up by the defendants* as one of the purposes and objects, *so that the said Hugh B. Monjar, one of the defendants, could and would obtain money by means of personal loans* from persons joining the said Mantle Club; * * *" (Emphasis supplied.)

The Government, in argument on petitioners' demurrer, contended:

> "The next ground of demurrer is that the scheme or artifice is not sufficiently accurate or particular.
>
> "The scheme as alleged in the first count of the indictment, and as realleged by reference in the other counts, shows:
>
> "(a) That it was devised in 1928 and has continued since that date." (Exhibit A to Bill of Exceptions, referred to on page 4, Item 5 of the Bill of Exceptions.)

On argument of motion of the defendants for a directed verdict, at the close of the Government's case, Mr. Kelly, counsel for the Government, stated (R. 5766):

> "What does that indictment charge? This indictment charges that this was a scheme to defraud, devised in 1928. We charge that as part of the scheme to defraud, the defendants caused the organization of the Mantle Club."

During the argument on the motion of defendants for a directed verdict the following colloquy of the Court and Government counsel occurred (SA. 41):

> "The Court: In other words, you say the 51 paragraphs in the indictment are repetitions of the various component parts of the grand scheme.
>
> "Mr. Lynch: That is right, sir. Your Honor has it."

In the course of the same argument, Mr. Kelly, counsel for the Government, also said (SA. 42):

> "But, after the Senator had cross-examined Mr. Oberholtz at some length, he asked him substantially the same question—*did he believe that the Mantle Club had been set up as a scheme to defraud?* And Mr. Oberholtz' reply struck me quite forcibly at the time because he said, 'Senator, I don't see how you could come to any other conclusion,' and I think that is true, as the Court please." (Emphasis supplied.)[9]
>
> "In the light of this testimony—certainly at this state of the testimony, in the light of this unexplained testimony, I do not see how the Court could come to any other conclusion other than the conclusion which had been reached by Mr. Oberholtz. Now, with regard to Mr. Oberholtz, was his testimony worthy of belief? I think it was."

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[9] While not directly involved in the point under discussion, it should be noted that this testimony for the Government was repudiated by the same witness on cross-examination (A. 433a-434a).

He amplified the same view (SA. 41):

> "Especially is that true when you take into consideration as you must—and here I say the defense tried to get off the track—you have to take into consideration not just the PL's alone, not just the Golden Braid situation alone, not only the Key Publishing Company situation alone, but, if the Court please, *this is all one cohesive conspiracy, and you have to take it all together.*" (Emphasis supplied.)

As a consequence, in instructing the jury, the Court charged (A. 723a):

> "The scheme to defraud alleged in the indictments in these cases is substantially as follows: The defendants planned, prior to the creation of the Mantle Club in 1928, *to create that Club as a vehicle or instrument to be used by the defendants in the perpetration of a fraud or frauds* upon its prospective members after the organization of said Club.
>
> "In order to find a verdict of guilty against any defendant under any count in these indictments, *it is necessary for the jury* to find beyond a reasonable doubt *that the scheme to defraud was devised prior to the organization of the Mantle Club*, which occurred in 1928." (Emphasis supplied.)

It was and is petitioners' contention that there was utterly no evidence to show that the organization of the Mantle Club was part of any fraudulent scheme, much less part of the scheme alleged in this indictment (see Assignment of Error No. 4 (A. 765a)).

The Government sought to avoid the point by treating the contention as being merely that the evidence had failed to prove the date of the devising of the scheme alleged in the indictment; to this it answered that this does not go to the essence of the offense (*Armstrong* v. *United States*, 65 F. 2d 853, 857 (C. C. A. 10)) and that, therefore, the

charge of the Court imposed an improper burden on the Government. As the second ground for opposing the contention, the Government relied upon testimony which, if believed, was sufficient only to show that the Mantle Club was formed for the same general purposes as motivated the formation and continuation of the Decimo Club from which Mr. Monjar was ousted in October, 1927.[10] The Circuit Court of Appeals accepted and adopted both of these arguments as sufficient (SA. 193-196). Failing to distinguish between the irrelevant question as to when a scheme is devised and the question here whether there was a scheme to form the Mantle Club as a vehicle for fraud,[11] the Court said SA. 194):

> "The actual date of the organization of the Mantle Club was not a vital part of the Government's case. The fraudulent scheme as charged and proved was not simply the formation of the Club."

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[10] The Government made, but the Circuit Court of Appeals apparently found no merit in, the assertion that fraudulent purpose in the formation of the Club appeared because:

(1) In 1928 Monjar and others actively promoted the H. B. Monjar Co., Inc., which promotion was contemporaneous with the Holaire Corporation, and also the Business Executives Association. A group of those interested in the H. B. Monjar Company were invited to a meeting at Rumford Hall, where they were told that by lending Monjar the sum of $100.00 in connection with a house-building enterprise, they might expect returns (GA. 1196-1205), which the Government attorney suggested were estimated at $50,000.00, but the witness could not recall.

(2) Witness Lewellyn testified that after investigation of the H. B. Monjar Company, Inc. by the Attorney General of New York in 1929, he loaned $200.00 to Mr. Monjar and accepted in repayment two shares of stock of the H. B. Monjar Company. The absurdity of suggesting that these items evidenced fraud was apparently obvious to the Circuit Court of Appeals.

[11] The reference to 1928 is important only as a temporal means of identifying the act, the formation of the Mantle Club, which is alleged to be an integral part of the scheme to defraud with which the defendants are charged.

This, of course, overlooks and ignores the fact that the fraudulent scheme charged, as urged by the Government, interpreted by the Court, and necessarily required to be proved, was the scheme to form the club as a vehicle for defrauding its future members. In adopting and expanding the Government's second ground the opinion of the Circuit Court of Appeals exhibits a rather transparent form of fallacious reasoning. It first alludes to the evidence that the Mantle Club was formed to promote and operate an organization similar to the Decimo Club, and to carry out the purposes with respect thereto which Monjar "always had had in mind." It then irrationally jumps to the alleged fraudulent occurrences in 1934, and concludes from these that "the unchanging purposes of Monjar as shown by the end results, were to defraud the members of the Mantle Club to the benefit of himself and his associates." No more transparent instance of irrational conclusion could well be imagined. Apparently the Court recognizes that the events occurring in 1934 could not rightly be said to show a fraudulent purpose in 1928. There is obviously less basis for contending that the occurrences in 1934 showed a fraudulent purpose in 1924-1927 in the formation and conduct of the Decimo Club. It is therefore absurd to reason therefrom that because the purposes of the Mantle Club formation were the same as those underlying the Decimo Club, the Mantle Club formation must therefore be deemed to have had a fraudulent purpose. The *non sequitur* in each chain of reasoning is exactly the same and is not cured by the introduction of the intermediate link referring back to the Decimo Club. That link adds no weight to the reasoning because there is no evidence that the Decimo Club was fraudulent in purpose, and the opinion of the Court does not even purport that there was.

Thus the sufficiency of the evidence to show the existence of the scheme alleged in the indictment is sustained by the Circuit Court of Appeals only by the invocation of the retrospective and violent inference that, because of fraudulent acts in 1934, it is to be inferred that the defendants planned to commit fraudulent acts when they formed the club five years previously.

It is submitted that where the inference is so strained as to have no foundation in common experience, and has no rational connection with the fact proved, it is so arbitrary as to make a verdict based thereon non-supportable as a matter of law. In holding to the contrary, the decision of the court below is at war with numerous decisions of this Court and of the circuit courts of appeals. *Tot* v. *United States*, 319 U. S. 463, 467; *Baumgartner* v. *United States*, 322 U. S. 665, 676, 677. In permitting the jury to infer from circumstances occurring in 1934 the existence of a fraudulent intent in 1928, the decision below plainly conflicts in principle with the decision in *Parlton* v. *United States*, 75 F. 2d 772, 776 (App. D. C.):

> "The law requires, particularly in a criminal case, an open and visible connection between the principle or evidentiary facts and the deductions for them, and does not permit a decision to be made on remote inferences. Manning v. Insurance Company, 100 U. S. 693, 698. It has been frequently said that proof of the existence of a given condition raises no presumption of its previous existence."

It is also in conflict with the decision in *W. F. Corbin & Co.* v. *United States*, 181 Fed. 296, 304-305 (C. C. A. 6). As stated in *1 Wharton, Criminal Evidence* (11th Ed.), p. 161:

> "A presumption of continuity is not retroactive, but is prospective only"

In *Underhill, Criminal Evidence* (4th Ed.) sec. 45, p. 59, the rule is stated:

> "A status shown to have existed once is presumed to continue until the contrary is shown, but such presumption is not retroactive."

As the fraudulent purpose of the defendants in this case was the design or intention in the minds of the accused, it must necessarily be ascertained by means of inferences from the facts and circumstances developed by the proof. As stated in *Manning* v. *Insurance Co.*, 100 U. S. 693, 698:

> "The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

And as held in *United States* v. *Ross*, 92 U. S. 281, 284:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves be presumed."

The Circuit Court of Appeals apparently recognized this rule but, by circuity of illogical reasoning, obscured its irrational process to arrive at the same erroneous result.

In the absence of evidence from which inferences properly may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculation, or suspicions as to intention not disclosed by any visible or tangible act, expression, or circumstance. Where, as here, the evidence of the crime consists solely of circumstantial facts, the evidence relied upon must exclude every hypothesis other than that of guilt. *Hart* v. *United States*, 84 F. 2d 799. *Union Pacific Construction Co.* v. *United States*, 173 Fed. 740 (C. C. A. 8). And, as held in *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, "A rebuttable inference of fact must necessarily yield to credible evidence of the ac-

tual occurrence." As held in *McDonald* v. *United States*, 9 F. 2d 506:

> "While it is a fundamental rule that men are presumed to intend the natural consequences of their acts, yet this presumption cannot prevail in the presence of positive proof of a specific intent different from that required by the statute. When such evidence is present, it devolves upon the Government to present affirmative evidence of the existence of the required unlawful intent."

Here there was no witness who stated that there was any fraud in connection with the organization of the Mantle Club. Fifteen witnesses, seven for the defense and eight for the Government, testified to the effect that there was no fraud in connection with the organization of the Mantle Club.[12]

Plainly, the highly attenuated—if indeed it is not preposterous—retrospective inference upon which the Government in the court below so heavily relied must disappear in the light of the uncontradicted and direct evidence of the

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[12] See testimony of witnesses for the defense:

Gottshall	(A. 519a-541a)
Davis	(A. 559a-569a)
Sidore	(A. 542a-558a)
Helenius	(A. 570a-571a)
Herder	(A. 572a-584a)
J. F. Jones	(A. 443a-485a)
Lewellyn	(A. 486a-518a)

and for the Government:

M. S. Apgar	(A. 411a-428a)
F. A. Muller	(A. 395a-410a)
Johnson	(A. 429a-431a)
Baird	(A. 435a-436a)
Dufford	(A. 439a-441a)
Oberholtz	(A. 432a-434a)
Cooper	(A. 437a-438a)
Royer	(A. 442a-443a)

numerous witnesses for both sides. The precedents are clear, and their correctness cannot reasonably be questioned. The decision of the court below is therefore obviously without support in the law.

Because the indictment alleged, and the case was tried on the theory of, only one comprehensive scheme with the formation of the Mantle Club as a fraudulent part thereof, the verdicts cannot be sustained on the theory that the evidence of some other scheme or schemes lurks in the record.—It is axiomatic that because a defendant is entitled to fair notice of the crime with which he is charged, evidence of a fraudulent scheme other than that charged cannot sustain a verdict. *Gammon* v. *United States,* 12 F. 2d 226, 228 (C. C. A. 2); *Rude* v. *United States,* 74 F. 2d 673, 676 (C. C. A. 10); *Brown* v. *United States,* 143 Fed. 219, 220 (C. C. A. 8); *Beck* v. *United States,* 145 Fed. 625, 626 (C. C. A. 2); *United States* v. *Corlin,* 44 F. Supp. 940, 945 (S. D. Calif., 1942). And where, as here, the jury was expressly charged that it could convict only if it found that the scheme to defraud was devised prior to the organization of the Mantle Club (A. 723a), the verdicts cannot be sustained on some subsidiary theory of guilt of another scheme or other schemes that might later have come into existence when the Club was expanded and personal loans solicited, or when some of the defendants became officers of the Key Publishing Company and sold the Key Magazine and Code, or upon the organization of the Golden Braid Costume Company and the sale by it of costumes to the National Board, or when the various business corporations were set up, or upon the payment of large salaries to officers of the Mantle Club and their associates, or with the organization and the operation of the Independence Club. None of these separate subordinate theories except that as to the personal loans commencing in 1934 was even developed in the hearing and defendants were

not tried for that; it was so far from being submitted to the jury as a theory of guilt that the court instructed the jury that it must find a scheme devised prior to formation of the Mantle Club in 1928. *Van Tress* v. *United States*, 292 Fed. 513, 521 (C. C. A. 6, 1923).

To uphold conviction on the theory of some subsidiary fraudulent scheme would be highly prejudicial.—The trial court took the view that every activity of the Club throughout the years was evidence which it could not exclude. It was this allegation which gave to the Government a wide field, and it was this theory of the case which permitted the Government to produce evidence of the large amount of income derived from the numerous activities in connection with the Club which were not in themselves in any way shown to be fraudulent. It was this theory of the Government which prevented the sustaining of the demurrer, the Government contending that all the transactions of the alleged scheme were the result of the original fraudulent scheme to organize the Mantle Club. Prejudice to the defendants resulting from this theory is exemplified by the evidence of the purchases of the back numbers of the Key magazine by the National Board. There was no dispute as to this. While there was no allegation in the indictment relating to the transaction, it was emphasized by the Government as important to show the scheme to defraud. It may well have been that it was upon this transaction that the jury based its verdict. Yet had the theory or theories of lesser or other frauds been even hinted at by the Government, it is plain that the demurrer would have to have been sustained, and in any event evidence as to activities involving no fraud *per se* would have been withdrawn from the jury.

It seems plain that the Circuit Court of Appeals erred in suggesting that it is now open to speculate that the jury's verdict was founded upon some scheme other than

that upon which the case was tried pursuant to the charge in the indictment and the reiterated theory of the Government and the charge of the trial court.

That defendants suffered prejudice from trial and conviction on one theory and justification of the verdict on another, is apparent. After demurrer had been overruled and particulars denied on the theory advanced by the Government and adopted by the Court, and after introduction of a vast amount of evidence admissible only under that theory, and after the same theory had been charged to the jury and conviction of the crime specified under that theory, and after sentence of the defendants accordingly, the Court of Appeals has now held that that theory was not required to be established by the evidence. It results that no one can know for what offense the jury is assumed to have convicted the defendants, nor whether the offense on which they were convicted was sustained by sufficient evidence; neither can it be known whether the sentence would have been as great had the trial court been aware that the defendants were guilty not of the crime charged but of some unspecified different crime which the Circuit Court of Appeals has thus far neglected to disclose. Therefore, also, the right of the defendants to plead former jeopardy to a charge of any offense included in the allegations of the indictment is questionable. Likewise, if the jury is assumed to have convicted the defendants of fraud in any particular transaction, Point 1 (pp. 30-32) hereof establishes that there was error in leaving before the jury evidence of other transactions which though not fraudulent were prejudicial. Also, there is every reason to assume that the jury convicted defendants of the crime specified in the court's charge, and not some other crime.

The error of the court below is so obvious and so plainly violates the basic right of the defendants to be informed

of the charge on which they are tried that the intervention of this Court is plainly required.

Conclusion

It is respectfully submitted that for the above-stated reasons the petition for writs of certiorari should be granted.

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